SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

SHERYL BROWN, **HF No. 86, 2007/08**
Claimant,

v. **DECISION**

HAYLOFT PROPERTY MANAGEMENT,
Employer,

and

AMERICAN FAMILY MUTUAL INSURANCE CO.,
Insurer.

This is a workers' compensation proceeding brought before the South Dakota Department of Labor pursuant to SDCL 62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. A hearing was held before the Division of Labor and Management, in Sioux Falls, South Dakota. Claimant, Sheryl Brown appeared personally and through her attorney of record, Renee H. Christensen. Jeremy D. Nauman represented Employer, Hayloft Property Management and Insurer, American Family Mutual Insurance Co.

Issues
The Department of Labor issued an Order of Bifurcation on May 28, 2008, indicating that the sole issue to be presented to the Department is whether Claimant met the statutory notice requirements of SDCL 62-7-10.

Facts
Based upon the record and the live testimony presented at hearing, the following facts are found by a preponderance of the evidence.

1. At the time of hearing, Sheryl Brown (Claimant) was 47 years old.
2. Claimant began working at Hayloft Property Management (Employer) on December 11, 2006, as a caretaker.
3. Claimant's job duties included cleaning windows, hallways, pool rooms, tanning facilities, vacuuming, and cleaning vacant apartments.
4. The process of cleaning vacant apartments and preparing them for new tenants was referred to as a turnover or turn.

5. Performing a turn required cleaning staff to clean the windows, bathrooms, and kitchen. Cleaning staff also pulled out and cleaned behind all the appliances including the stoves, refrigerators, washers, and dryers.
6. Claimant's direct supervisor was Karmen Albee.
7. On May 15, 2007, while performing a turn, Claimant experienced pain in her low back and down her left leg when she was moving the appliances to clean behind them. Claimant had to stop working for a short period of time due to the pain, but was able to finish her shift.
8. Karmen Albee was not in her office at the end of Claimant's shift when Claimant turned in her time card.
9. Claimant was scheduled to work at Hayloft on May 16, 2007.
10. Claimant called in to work on May 16, 2007, and left a message on Karmen Albee's answering machine indicating that Claimant hurt her back at work and was going to see the doctor.
11. On May 16, 2007, Dr. Donn J. Fahrendorf D.C treated Claimant for her back pain. Dr. Fahrendorf's records reflect that Claimant was non specific as to the cause or her injury, but that she felt it could have started at work.
12. Dr. Fahrendorf took Claimant off work effective May 16, 2007, and gave Claimant a note to take to work that indicated she was off work.
13. Claimant presented the note to Karmen Albee. Ms. Albee did not complete a first report of injury, nor did she inquire as to the cause of Claimant's injury.
14. Claimant was released back to work with restrictions on May 21, 2007. Dr. Fahrendorf instructed Claimant to "limit any heavy lifting and avoid prolonged, continuous activities."
15. On June 11, 2007, Dr. Fahrendorf took Claimant off work again.
16. On June 13, 2007, Claimant was released to work. Dr. Farhendorf advised "light to medium duty work."
17. On June 22, 2007, Claimant was released to work without restrictions.
18. On July 13, 2007, Dr. Fahrendorf took Claimant off work again.
19. On July 16, 2007, Dr. Fahrendorf discussed an orthopedic referral for Claimant to have an X-ray and possibly an MRI. Claimant eventually underwent back surgery on August 8, 2007.
20. Prior to May 2007, Claimant did not have a history of missing work, and she was able to do her job without restrictions.
21. After May 2007, Claimant often missed work and had difficulty completing her duties without asking for help from her co-workers. After May 2007, Claimant was often able to work only 16 of her regular 40 hours.
22. Claimant was terminated by Employer on August 2, 2007, for excessive absenteeism.
23. A first report of injury was completed after Claimant was terminated.

Other facts will be determined as necessary.

Analysis
The purpose behind the notice requirement is to give the employer an opportunity for investigation of the accident and injury while the facts are accessible. The requirement of notice of injury is designed to protect the employer by making sure he is alerted to the possibility of a claim so that a prompt investigation can be done. *Schuck v. John Morrell & Co.*, 1995 SD 30, ¶19, 529 NW2d 894 (SD 1995).

SDCL 62-7-10 provides:

> An employee who claims compensation for an injury shall immediately, or as soon thereafter as practical, notify the employer of the occurrence of the injury. Written notice of the injury shall be provided to the employer no later than three business days after its occurrence. The notice need not be in any particular form but must advise the employer of when, where, and how the injury occurred. Failure to give notice as required by this section prohibits a claim for compensation under this title unless the employee or the employee's representative can show:
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> (1) The employer or the employer's representative had actual knowledge of the injury; or
> (2) The employer was given written notice after the date of the injury and the employee had good cause for failing to give written notice within the three business-day period, which determination shall be liberally construed in favor of the employee.

Claimant bears the burden of proof to show that her employer had notice of the work related nature of her injury. *Mudlin v. Hills Materials Company*, 2005 SD 64, 698 NW2d 67. It is undisputed that Claimant did not give written notice of her back injury within three business days as required by the statute. However, Claimant argues that she has met the actual knowledge exception to written notice requirement.

Actual Knowledge
When an employer has actual knowledge of the injury, the failure to provide written notice does not bar the claim. *Westergren v. Baptist Hospital*, 1996 SD 69, ¶17, 549 NW2d at 395. The standard used for determining whether an employer has actual knowledge is whether the employer is alerted to the possibility of a claim so that a prompt investigation can be performed. (citations omitted). *Vaughn v. John Morrell & Co.*, 2000 SD 31, ¶27, 606 NW2d 919.

In determining whether Employer had sufficient knowledge to indicate the possibility of a compensable injury, the South Dakota Supreme Court has held,

> The cumulative evidence put Employer on notice that something out of the ordinary had occurred and gave them an opportunity for questioning and investigation. While any one of the circumstances alone might not be enough to

> find that the employer had notice of injury, their combined occurrence within a very short period of time gave Employer knowledge of the injury. (internal citations omitted).

Id at ¶31. Claimant testified at hearing that on May 16, 2007, prior to her doctor appointment, she left a message on Karmen Albee's answering machine. Claimant testified that she said she hurt her back at work and would return to work with a doctor's note. Claimant's husband, testified that he witnessed his wife make the phone call and leave the message for Ms. Albee. On the first report of injury dated August 10, 2007, there is also a reference to the message left on the answering machine.

Karmen Albee testified at the hearing that she never received the phone message left by Claimant. Employer/Insurer argues that a message left on the answering machine is not sufficient to provide actual knowledge. Employer/Insurer rely on *Clausen v. Northern Plains Recycling*, 2003 SD 63, 663 NW2d 685, where the Department rejected the Claimant's testimony that he had called his Employer's cell phone. The present case is distinguishable from *Clausen*. In *Clausen* there was no corroborating evidence that a call was made, and phone records presented at hearing indicated no call was ever received on Employer's cell phone. The Department may weigh the evidence and determine the credibility of the witnesses. The Department is free to choose between conflicting testimony. *Petersen v. Hinky Dinky*, 94 SDO 317, 515 NW2d 226 (SD 1994). In the case at hand, the evidence supports Claimant's assertion that she left a message for Ms. Albee on the morning of May 16, 2007. Claimant's testimony and that of her husband is accepted as credible.

Claimant also argues that Employer had actual knowledge because Claimant personally told Karmen Albee that she injured her back at work and on several occasions requested that a first report of injury form be completed. Employer/Insurer argues that Claimant never informed her that Claimant's injury was work related. Karmen Albee testified that she was aware Claimant was missing work due to a back injury and that she was treating with a chiropractor. Karmen Albee further testified that she never asked Claimant how she hurt her back and never investigated the reason Claimant was missing so much work.

Jennifer Livingston, the regional manager, and Tina Bruske, the HR and payroll representative, each testified in their depositions that the individual manager, Karmen Albee was responsible for filling out a first report of injury. In this case, Karmen Albee never completed a first report of injury for Claimant. Ms. Albee testified at hearing that she had never completed a first report of injury before. Tina Bruske testified that Ms. Albee was "pretty capable of filling out the forms, because [she] had received them from her before." Both Tina Bruske and Jennifer Livingston completed first report of injury forms for Claimant after Claimant's termination. The evidence suggests two different forms were submitted because there was confusion over which appliance was being moved by Claimant when she was injured. Claimant testified that neither Ms. Livingston

nor Ms. Bruske talked to Claimant prior to filling out the first report of injury forms to submit to Insurer. In the case at hand, the evidence supports Claimant's assertion that she informed Karmen Albee of her work related injury and Karmen failed to acknowledge the possible work related injury or fill out a first report of injury.

Claimant also argues that Employer had actual knowledge because of Claimant's dramatic change in condition. Claimant relies on *Orth v. Stoebner & Permann Construction, Inc.*, 2006 SD 99, 724 NW2d 586, where the South Dakota Supreme Court concluded that the claimant's change in condition should have indicated to a reasonably conscientious manager that there might be a potential claim. In *Orth*, Claimant terminated his employment with employer because his back condition had become so painful that he couldn't do the work anymore. Claimant told his employers that his back pain was caused by "degenerated discs and wore [sic] out". The Court determined that a reasonably conscientious manager would ask: "worn out from what?" *Id* at ¶61.

Employer/Insurer argues that *Orth* is distinguishable from the case at hand because Claimant in *Orth* had been a long time employee with an exceptional work record and his inability to work was a more dramatic change in condition than in this case. Employer/Insurer argues that Claimant in this case had only worked for Employer for a short time and was not an exceptional employee, but merely an adequate employee prior to her injury. The fact remains, prior to her injury Claimant could do her job and work her scheduled hours, after her injury Claimant could not do her job or work her scheduled hours. Claimant demonstrated a significant change in condition that Employer was aware of and chose not to investigate.

If an employer is put on notice that an injury may be work related, the employer has actual knowledge sufficient to satisfy SDCL 62-7-10(1). *Id*. Ms. Albee was aware of Claimant's injury. Ms. Albee acknowledged at the hearing that is would not seem unreasonable for someone to be injured moving appliances. Ms. Albee acknowledged that before her injury, Claimant was capable of physically performing her duties. Ms. Albee also acknowledged that after Claimant's injury, there was a change in her ability to work, and she missed a great deal of work due to her injury.

Employer/Insurer also argues that in *Orth*, Employer was perfectly well aware that back injuries such as the Claimant's were a common occurrence in his line of work which involved heavy manual labor for long hours. Employer/Insurer argues that in the present case, Claimant did not perform heavy manual labor and that back injuries were not a common occurrence among the housekeepers. This argument is rejected; the standard used for determining whether an employer has actual knowledge is not whether the type of injury is probable or a common occurrence in a particular line of work, but rather if employer is alerted to the *possibility* of a claim.

Ms. Albee discussed Claimant's back problems, absenteeism and inability to work regularly scheduled shifts with her supervisors, and yet no investigation was done to determine whether Claimant's injury was work related. Karmen Albee testified at hearing that she did not believe it was any of her business why Claimant went to the doctor. Based on the opportunity to observe the witness at hearing and based on the evidence presented, the testimony of Karmen Albee is rejected as not credible. Claimant has satisfied her burden of proving that her employers had actual knowledge of her injury and its potential work-relatedness.

Claimant shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Employer/Insurer shall have ten (10) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Claimant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 12th day of June.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Taya M. Dockter
Administrative Law Judge